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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 107.

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. M. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

SUPPLEMENTARY BRIEF FOR THE PLAINTIFF-IN-ERROR.

T. M. HARRISON,
Pro Se.

W. R. Castle, David L. Withington and *A. G. M. Robertson*, for the Plaintiff-in-Error.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
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The plaintiff-in-error in this brief will only touch on points raised by the briefs of the defendants-in-error and not covered by plaintiff-in-error's first brief, hereinafter referred to as plaintiff's brief.

THE MOTION TO DISMISS.

The first ground for the motion to dismiss, is that the decision

to which the writ of error, now at bar, was sued out is not a final judgment.

Revised Laws of Hawaii, Section 1627 provides: "The supreme court shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."

Section 1628 provides: "The supreme court shall have appellate jurisdiction to hear and determine all questions of law, or mixed law and fact, which shall be properly brought before it on exceptions," etc.

Section 1865, provides, that upon the allowance of a bill of exceptions from a circuit court, "the questions arising thereon shall be considered by the supreme court," and that judgment may be entered and, "arrested pending such exceptions."

Section 1867, provides: "When judgment has been entered in any cause in which exceptions have been allowed, the judgment may be vacated by the supreme court without any writ of error in like manner as if it had been entered by mistake, and thereupon such further proceedings shall be had in the cause as to law and justice shall appertain."

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered."

Mower v. Fletcher, 114 U. S. 127:29 L. 117.

Such was the condition of the judgment in the case at bar. It was not necessary to even, "require the inferior court to perform the ministerial act of entering the judgments in that court which had been ordered," (Mower v. Fletcher, ubi supra) as the judgment of the inferior court became enforceable by operation of law when the exceptions were overruled.

Other cases which recognize this principle are:

Gregory v. McVeigh, 23 Wall. (U. S.) 294:23 L. 157.

Fisher v. Perkins, 122 U. S. 522:30 L. 1192.

The exceptions finally disposed of the questions raised thereby, and they could not be again reviewed by the same court. (See *Notley v. Brown,* 17 Haw. 455). It has also been held

in *Cummings v. Iaukea,* 10 Haw. 1, that the six months within which a writ of error may be sued out from the Supreme Court of Hawaii commences to run from the entry of judgment in the lower court and not from the overruling of the exceptions thereto; and that: "A writ of error and bill of exceptions are concurrent methods for the correcting of errors made in the lower courts—the conditions and limitations in each method being different." Thus, when the decision at bar was rendered, not only were all collateral modes of reviewing the judgment of the Circuit Court, whether by motion for new trial or writ of error, barred by lapse of time, but that decision was final on the points excepted to and terminated the "litigation between the parties on the merits."

The Act of March 3, 1905, provides: "That writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States," but does not grant a review by this Court of the proceedings in the Circuit Courts of Hawaii, hence cases like *Green v. Van Buskirk,* 3 Wall. (U. S.) 448:18 L. 245, are not in point.

II.

With regard to the second ground for the motion to dismiss, it has been repeatedly held by this Court, that the question of the finality of a judgment for review by Federal Courts is not affected by local procedure, and thus only Federal cases are authorities on this point.

Chateaugay Ore and Iron Co., Ex Parte, 128 U. S. 544:32 L. 508.

Andes v. Slauson, 130 U. S. 435:32 L. 989.

Bronson v. Schulten, 104 N. S. 410:26 L. 797.

Missouri Pac. Ry v. Chicago & R. R., 132 U. S. 192:33 L. 309.

It has also been repeatedly decided here, that when an act of Congress changed the right of appeal from judgments, that such judgments, concerning which petitions for rehearing were

pending when the change occurred, were appealable according to the changed conditions.

Voorhees v. Noye Mfg. Co, 151 U. S. 135:38 L. 101.
Northern Pacific R. Co. v. Holmes, 155 U. S. 137:39 L. 99.

III.

With regard to the third ground for the motion to dismiss, the right of this court to review the errors assigned is argued in plaintiff's brief on pages 63 et seq.; but some points not fully presented there are raised in *Sparrow v. Strong,* 4 Wall. (U. S.) 584.

In that case this Court denied a motion to dismiss and only refused to review the order affirming the denial of a new trial when it discovered there was nothing before the appellate court other than the affirmance of the order denying the motion for new trial and concluded, upon examining "the record further," that *under the practice in Nevada,* "the decision of the District Court in such a case was the exercise of a discretion * * * And * * * that the decision of the appellate court was equally an exercise of discretion upon the law and the facts." (4 Wall. (U. S.) 584, 588:18 L. 413).

Under the Hawaiian statutes and practice the decision of a motion for new trial based on errors of law is not a matter within the discretion of the trial court.

When a motion for new trial, on the ground the verdict was against the weight of the evidence, was presented for review, it was held: "The question presented to us is not precisely that presented to the trial judge on the motion for new trial, but rather whether that judge exercised a sound judicial discretion in granting the motion. *This is the rule where the motion is not founded upon errors of law.*"

Macfarlane v. Lowell, 9 Haw. 438.

The same principle is recognized in:

Smith v. Hamakua Mill Co., 14 Haw. 669, 678.
Stone v. Hutchinson, 4 Haw. 117.
George v. Holt, 9 Haw. 135, 136.

Since, in the case at bar, the trial court did not pass upon

the motion for new trial and overrule it—as alleged in defendants' motion to dismiss—but held it had not power to decide the motion, (Tr. 208, 221); it is apparent the appellate court did not review the discretion of the trial court, as the trial court had refused to exercise discretion or to pass upon the motion, but it proceeded to review the judgment of nonsuit rendered at the trial, and having sustained that judgment, it held that any failure to exercise discretion by the trial court on the question of new trial was immaterial.

THE BRIEF OF DEFENDANTS, J. A. MAGOON, F. B. McSTOCKER AND DOROTHEA EMERSON.

DEFENSE I.

The Supreme Court of Hawaii decided in the case at bar (16 Haw. 170: Tr. p. 225) that a motion for new trial was proper after involuntary nonsuit from the inherent right of Courts to review their own judgments, as well as for other reasons (*14 Ency. Pl. & Pr.* 718, 932) and this seems to be the practice elsewhere where there are no statutes to the contrary (14 Ency. Pl. & Pr. 831 and note). This matter was again ruled on in:

Roe v. McGrew, 17 Haw. 596.

DEFENSE II.

The instructions received by plaintiff at Sydney were a part of the business in Tasmania, and unsatisfactory features in them necessarily belonged to that business. Plaintiff's decision to proceed with the business after he received the instructions shows he was determined to give it a fair trial, so far as the means at his disposal would allow, no matter how discouraging the outlook was. And his uncontradicted testimony shows he did his utmost to make that business satisfactory (Tr. p. 138). It does not make the plaintiff's dissatisfaction any the less bona fide because he endeavored to convince himself it was mistaken after it first arose. The defendants have not produced any

cases to show that a party who has contracted to prosecute a business believing it to be different from what it is represented has not ground for dissatisfaction—both legal and otherwise—if he afterwards learns he has been deceived into contracting to prosecute a humbug, nor is he obliged to believe the business a humbug when he first has reason to conclude it is such, but it is his privilege, if not his duty, to test the matter. This point is passed upon in: 14 Haw. 418:426.

DEFENSE III.

Because plaintiff's salary was a first charge on the receipts of the business it did not debar him from collecting it from other sources if there were no receipts.

Plaintiff was to be made sole judge of whether or not the business was satisfactory. The conduct of O'Brien, the efforts the plaintiff made to start the business, his lack of success and his knowledge that the defendants would advance no more money in the matter were enough to cause him bona fide dissatisfaction (Tr. pp. 104-5-6-7), while its total lack of success elsewhere might have convinced him of the futility of wasting more time or money on the matter. If the question of plaintiff's dissatisfaction is not disposed of by his uncontradicted testimony it is a matter for the jury.

DEFENSES IV AND V.

As to the right of the defendants to contract to sell stock whether at the time they owned it or not see:

Bibb v. Allen, 149 U. S. 481:37 L. 81[illegible]

Irwin v. Williar, 110 U. S. 499:28 L. 225.

The phrase "market value" has but one meaning, while plaintiff's testimony shows (Tr. pp. 121-2) why the contract to deliver stock instead of cash was made, why the defendants had the option to deliver it within their sphere of business, and that the word stock meant any kind of corporation stock. The evidence must be considered most favorable to the plaintiff on a motion for nonsuit.

DEFENSE VI.

It is not necessary that the consideration should move from the promisee to the promisor so long as it moves to someone at the request of the promisor (6 Ency. of Law 686); and, furthermore, if it was represented that the consideration did not move directly to all the defendants, yet in fact it did so, and by accepting and retaining the consideration with full knowledge of all the facts they are bound. If Ables took the sheep as his own and disposed of them as such and the defendants at Honolulu wish to maintain Ables had no authority to make the contract and they did not ratify it, they should have refused to accept the proceeds of the sale of the sheep Ables made on their behalf, or if they did not know all the details of that contract when they received those proceeds they should have returned the proceeds when they learned the details.

DEFENSE VII.

The sheep were conveyed in consideration of all the promises in the contract.

DEFENSE VIII.

This matter was disposed of in plaintiff's brief, pages 30 to 53. Neither Moore nor Powter have appeared in the action at bar and defenses can not be made on their behalf unless they submit to the jurisdiction of the Court.

DEFENSES IX, X AND XI.

This matter is treated of in plaintiff's brief, pages 1 to 30. If the defendants in Auckland exceeded their authority to the extent here complained of it does not appear that these matters were unknown at Honolulu, and, at least, the plaintiff had reason to believe they were known as the partnership articles of April 10th, 1897, (Tr. pp. 156-7-8) provided for accounts of all transactions being sent to Honolulu "every month, or oftener if necessary." Thus these very actions were evidence of the

confidence and authority that had been placed in the partners at Auckland since no steps were taken to repudiate their authority.

It appeared nowhere in the partnership articles of 10th April, 1897, that the fund for starting the business was anything less than $105,000, nor is there any evidence that the plaintiff, or anyone not a party to that contract, knew that fund was less than $105,000 before this action was tried.

The defendants on page 30-1 of their brief allege it is a very different thing to contend a partner had authority to create a liability for a small amount from contending he had authority to create a liability, "which might ruin all his co-partners." It is submitted the creation of a $10,000 liability in the conduct of its business is not unreasonable or excessive for a partnership with a capital of $105,000, and, in any event, it is a question for the jury.

The defendants contend (brief page 26) that the partners at Honolulu had no authority to acquire a ranch, and yet declare at page 32 of their brief, that the powers of attorney were necessary to the partners in New Zealand for "the disposition of any real estate the company might acquire."

The cases cited by the defendants under these heads are not in point in that they do not refer to the conduct of unusual business in foreign countries or refer merely to the interpretation of the language of instruments without considering the conduct of the parties.

DEFENSE XII.

Moore's knowledge of the agreement sued on was not a matter of the details of the business in New Zealand, and, furthermore, it does not appear that the defendants inquired of Moore concerning that agreement, as was their duty, considering both the knowledge they had of it and of what had been done in New Zealand by their partners. (See Plaintiff's Brief, pp. 22-26).

The cases cited by the defendants under this head are chiefly those where the agent paid money, he had obtained by false representations of authority, to the principal in satisfaction of his

own private debts, and not as money received in his capacity as agent, the distinction between this class of cases and that at bar appears in a case cited on page 39 of defendants' brief, *Baldwin v. Burrows,* 47 N. Y. 199, 212, which reads:

"Furthermore, according to their statement, they (the principals) had not received the money as their own, or as arising from a dealing between them and the plaintiffs through Blanchard as their agent, but as the money of Blanchard, in receiving which they dealt with him as a principal."

There can be no question that their proportional share of the £500 received from the sale of the sheep was either paid to the defendants in dividends or spent in the conduct of the partnership business for their benefit (Plaintiff's brief, pages 26-30), while there is no evidence—as alleged on page 40 of defendants' brief—that the plaintiff would have refused any portion of the £500 if it had been tendered to him, and credited it on the defendants' liability, whatever that may be.

The retaining of plaintiff's property is certainly a prejudice to him, and cases which hold: "Acts that amount to acquiescence must be such as to prejudice a party who claims the benefit of them," are not in point.

Lester v. Kinne, 37 Conn. 9, quoted from in defendants' brief, page 41, is not in point. It was an equitable action for the specific performance of the conveyance of real estate, the amount in dispute, $100, was small; and the Chancellor found that the respondent Coon had conveyed the land he had contracted to convey for the money received, according to his understanding of the agreement at the time of payment; and that the other lot, it was alleged Kinne, without authority, had agreed Coon should convey for that money, was promised under an oral agreement void by the statutes of frauds, besides this the court seems to have considered the fact, that the respondents' testimony was contrary to the Chancellor's findings. It was a very different thing from an action for breach of an agreement to return the consideration, or its value, if the property sold is returned. Furthermore, the agreement at bar is in writing, and the plaintiff returned what he had received under it when

he delivered the business in Tasmania to O'Brien, the agent of the defendants (Tr. pp. 103-107, 141-2).

This case in no way refutes the authorities cited in plaintiff's brief, pages 26, 27 and 28.

DEFENSE XIII.

Notice to one partner is notice to all (22 Ency. of Law, 139). See Plaintiff's brief, page 53.

DEFENSE XIV.

As Ables sold the sheep on the 10th of October, 1897, (Tr. p. 67) and did not write to Harrison sending him the medicines and instructions until the 12th of October, 1897 (Tr. p. 62 and Tr. 168 Ex. I) and as Harrison did not telegraph to stop the sale of the sheep before he received the instructions (Tr. p. 102) his telegraphs could not have affected the sale.

When sheep are sold and delivered for the price of the wool on their back and £50 paid on the contract price of £500, no amount of diligence will render such a contract void in New Zealand, whatever it might do elsewhere.

DEFENSE XV.

The consideration for the agreements of Sept. 16th and Sept. 21st, 1897, (Tr. pp. 97-98-178-180 Ex. O. & P.) was the conveyance of the sheep, a portion of which were subject to a lien, while the further consideration for the agreement of October 1st, 1897, was the release of that lien. (Tr. pp. 97-8 & 182-3 Ex. O. & R.) This question is passed upon in 14 Haw. 418, 426.

MISCELLANEOUS.

The reference of 1 Ency. of Law 1127, that an agent is not personally liable if he contracts as such with a party who knows his lack of authority refers, as is shown by the notes and the context, to cases in which the person dealing with the agent knows facts which affirmatively show his lack of authority, and the agent does not represent he has other authority, and not to cases where the agent represents or guarantees he has authority or makes himself personaly liable for the performance

of the contract. In the case at bar there was nothing in either the partnership articles or the powers of attorney to show that the partners in New Zealand did not have authority to make the contract sued on, while they not only guaranteed they had such authority by making the contract, but when the plaintiff saw the partnership articles and powers and wanted a further guarantee (Tr. p. 98) than was given by the first two contracts (Tr. pp. 178-180 Ex. O. & P.) they undertook individually to perform the contract in the new agreement. *Story on Agency, Ninth Edition, Revised by Greenough,* page 316, section 265, states the rule more accurately:

"This doctrine, however, as to the liability of the agent, where he contracts in the name and for the benefit of the principal, without having due authority, is founded upon the supposition that the want of authority is unknown to the other party, *or, if known, that the agent undertakes to guarantee a ratification of the act by the principal.*"

This principal is recognized in *Dowling v. National Exchange Bank of Boston,* 145 U. S. 512:36 L. 795, *Harrington v. Higham,* 15 Barb. (N. Y.) 524, *McNeild v. Ried,* 9 Bing 68, and numerous cases of partners being personally liable on contracts made on behalf of the partnership without authority cited in plaintiff's brief, pages 36 to 53.

BRIEF FOR THE DEFENDANT ABLES.

ARGUMENT I.

As to a summons being notice of a claim see *Bishop on Contracts,* section 832.

It is stated at page 14 of this brief concerning the individual liability of Ables: "It is to be noted at the outset that all plaintiff's cases are cases of joint and several bonds." We submit an examination of plaintiff's brief will show this is far from correct.

ARGUMENT II.

Whatever the law may be with regard to the judgment of a sister state being a merger of the cause of action on which it is brought, all the United States and State authorities, with the ex-

ception of Illinois and Louisiana, hold that the judgment of a foreign country creates no such merger.

"As the original debt is not merged in a judgment rendered in a foreign court, a certified copy of such judgment may be used as evidence by either party, in a suit on the original cause of action, without a formal allegation in the pleadings; and if it settles the whole controversy between the parties it ought to be held conclusive."

New York, &c. R. Co. v. McHenry, 17 Fed. 414.

"The fact that assumpsit lies on a foreign judgment is decisive that the demand has not passed into a security of a higher nature, so as to operate as a technical merger."

Lyman v. Brown, 2 Curtis 559:15 Fed. Case 8627.

See to the same effect:

13 Ency. of Law 1016.

Black on Judgments, 847.

1 Herman on Estoppel and Res Judicata 591.

This case has been twice tried since the declaration was amended by omitting the count on the New Zealand judgment, and in the decisions of the Supreme Court of Hawaii on both trials no reference or holding appears that the contract sued on was in any way merged in that judgment.

It is erroneously stated on page 13 of plaintiff's brief, that the petition for rehearing was filed January 24th, 1905, when in fact, as appears by the transcript on page 260, it was filed January 18th, 1905.

The following case on surprise was omitted from page 63 of plaintiff's brief:

Davies v. Hackfeld, 6 Haw. 181.

Wherefore the plaintiff-in-error submits the judgment of nonsuit should be reversed as to each and all of the defendants-in-error and a new trial ordered.

Respectfully submitted,

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Pro. Se.

W. R. Castle, David L. Withington and *A. G. M. Robertson,* for the Plaintiff-in-Error.